

Houston Distributing Company, Inc. and Harold Williams, Petitioner, and Brewery, Soft Drink, Industrial & Allied Workers Local Union No. 1111, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 23-RD-496

April 13, 1982

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered certain objections to a decertification election held November 12, 1981,¹ and the Regional Director's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and brief filed by the Employer and hereby adopts the Regional Director's findings and recommendations only to the extent consistent herewith.²

On November 17, 1981, the Union filed objections to the election, two of which the Regional Director recommended be sustained in his report issued December 4, 1981. We disagree with the Regional Director's recommendation in both instances.

The Union's first objection concerns the adequacy of the voter eligibility list provided by the Employer. The Union contends that the list submitted by the Employer on October 20, 1981, failed to include the names and addresses of 42 bargaining unit employees who were engaged in an economic strike against the Employer. The Employer acknowledged that the names were left off the voter eligibility list but maintains that because it had given the Union a list of the names, addresses, and telephone numbers of the strikers on September 11, 1981, during negotiations, it had complied with the requirements set out in *Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).

The Regional Director, while acknowledging that the Board does not apply the *Excelsior* list rule mechanically, found the Employer's submission of a list lacking a substantial number of eligible voters fell short of the requirements of the rule. The Regional Director cited *Custom Catering Inc., d/b/a Blue Onion*, 175 NLRB 9 (1969), as authority for

sustaining the objections. We find that case inapposite and disagree with the Regional Director's decision to sustain the objection. In *Custom Catering* the employer submitted an *Excelsior* list 1 day late leaving off the names of strikers as well as five replacements. The list also contained several incorrect addresses and two ineligible voters. Following a union protest, the employer filed a supplemental list which listed all but one of the strikers but failed to list the five replacements. The supplemental list was filed only 6 days before the election, much less than the 3-week period originally intended. By contrast, the Employer in this case provided the Union with the names and addresses of all employees, in two separate lists, both of which were received well before the election. The egregious avoidance of an obligation manifest in *Custom Catering* is simply not present in this case. The Employer provided the Union with the names of employees in ample time to allow the Union to make all potential voters aware of the election issues. As the Regional Director noted, the Board will not apply the *Excelsior* rule mechanically. To find an absence of compliance here would be just such a mechanical application. Accordingly, we find no merit in the Union's Objection I.

The second objection concerns the description of the unit included in the Stipulation for Certification Upon Consent Election. The description included five classifications which were excluded from the unit in the most recent collective-bargaining agreement. The Union contends that the inclusion of the positions was error and that because those employees voted in the election (without challenge) the election should be set aside. The Regional Director sustained the objection relying on the language in *Brom Machine & Foundry Co.*, 227 NLRB 690 (1977), stating that the Board's policy of directing a decertification election in the existing bargaining unit would be frustrated if the parties could stipulate to a different unit. *Id.* at 690.³

Contrary to the Regional Director, we certify the results of this election even under the rationale of *Brom*. That case involved challenges to the ballots of three employees in classifications included in a stipulated unit but excluded from the collective-bargaining agreement. Those challenges were sustained on the ground that, regardless of the parties' stipulation, the employees were in classifications which were excluded from the existing recognized unit.⁴ A Certification of Representative then

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 5 for, and 82 against, representation by the Union; there were 27 challenged ballots, a number insufficient to affect the results.

² In absence of exceptions we adopt *pro forma* the Regional Director's recommendation that Objection 3 be overruled in its entirety.

³ See also *Brom Machine & Foundry Co.*, 229 NLRB 1272 (1977), *enfd.* 569 F.2d 1042 (8th Cir. 1978).

⁴ We note that this issue has traditionally been resolved through the challenge procedure. See, e.g., *Warren Petroleum Company*, 91 NLRB 1428 (1951). *Fast Food Merchandisers, Inc.*, 242 NLRB 8 (1979).

issued because the union had received a majority of the valid votes cast. Plainly, the Board found no need to set aside the election merely because it was conducted in a unit different from the existing bargaining unit. Here there were 14 employees in 5 disputed classifications. They were not challenged when they voted. Had they been challenged, and had those challenges been sustained under the rationale of *Brom*, a certification of results would still have issued as the 14 challenges would not have affected the outcome of the election. We see no reason to reach a different result simply because the Union raised this issue in its objections rather than by challenge. Indeed, to follow the Regional Director's approach would discourage the traditional resolution of such matters through the chal-

lenge procedure. Accordingly, we find no merit in the Union's Objection II, and in view of the foregoing we certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for Brewery, Soft Drink, Industrial & Allied Workers Local Union No. 1111, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and that said labor organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.